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Before the
Federal Communications Commission
Washington, D.C. 20554

FCC 03M-52

02834

In the Matter of)	EB Docket No 03-152
)	
WILLIAM L. ZAWILA)	Facility ID No. 72672
)	
Permittee of FM Station KNGS,)	
Coalinga, California)	
)	
Et al.)	

MEMORANDUM OPINION AND ORDER

Issued. December 4, 2003

Released December 8, 2003

1. Under consideration are. (a) a Petition for Leave to Intervene, filed on August 27, 2003, by Richard B. Smith ("Smith"), (b) the Enforcement Bureau's Opposition to Petition for Leave to Intervene, filed on September 10, 2003, by the Enforcement Bureau ("Bureau"); (c) a Joint Opposition to Petition for Leave to Intervene, filed on September 10, 2003, by William L. Zawila, Avenal Educational Services, Inc., Central Valley Educational Services, Inc., H. L. Charles d/b/a Ford City Broadcasting, Linda Ware d/b/a Lindsay Broadcasting, and Western Pacific Broadcasting, Inc. (collectively "Zawila"); (d) a Motion for Leave to File Reply, filed on September 11, 2003, by Smith; (e) a Consolidated Reply to Oppositions to Petition for Leave to Intervene, filed on September 11, 2003, by Smith; (f) a Supplement to Consolidated Reply to Oppositions to Petition for Leave to Intervene, filed on September 11, 2003, by Smith; (g) a Joint Motion to Strike or, in the Alternative, Response to Consolidated Reply to Oppositions to Petition for Leave to Intervene, filed on September 12, 2003, by Zawila, (h) the Enforcement Bureau's Opposition to Motion for Leave to File Reply, filed on September 17, 2003, by the Bureau; (i) an Opposition to "Joint Motion to Strike or, in the Alternative, Response to Consolidated Reply to Oppositions to Petition for Leave to Intervene," filed on September 24, 2003, by Smith; (j) a letter addressed to the Commission's Secretary, filed on September 25, 2003, by counsel for Zawila, and (k) a Statement for the Record, filed on September 26, 2003, by Smith.

Motion for Leave to File Reply

2. Smith filed a Petition for Leave to Intervene which was opposed by both the Bureau and Zawila. Subsequent to the filing of the oppositions, Smith filed a Consolidated Reply to those pleadings as well as a Motion for Leave to File Reply. In the latter, Smith claims that the filing of a reply is warranted because the oppositions to his intervention petition were "based . . . on fundamentally incorrect assumptions." Motion for Leave to File Reply at ¶ 2. Specifically, Smith argues that both the Bureau and Zawila "misstate the nature of this proceeding, characterizing it as strictly a revocation proceeding [whereas this] case includes a license renewal application." *Id.* Noting that Section 1.223 of the Commission's Rules distinguishes between intervention as a matter of right (Section 1.223(a)) and intervention as a matter of discretion (Section 1.223(b)), Smith contends that, in formulating his Petition for Leave to Intervene, he "did not believe that it would be necessary to address the differences in the standards because [he] believed it obvious from the caption . . . that Section 1.223(a) is applicable." *Id.* at ¶ 4. Both the Bureau and Zawila oppose the Motion for Leave to File Reply, and Zawila moves to strike Smith's Consolidated Reply. Smith opposes the motion to strike.

3 Smith's Motion for Leave to File Reply will be denied and his Consolidated Reply to Oppositions to Petition for Leave to Intervene, and his Supplement thereto, will be dismissed. It is well established that replies to oppositions to petitions for leave to intervene are unauthorized pleadings *Ellis Thompson Corporation*, 10 FCC Rcd 7325, 7326 (¶ 7) (Rev. Bd. 1995), *rev. denied* 10 FCC Rcd 11434 (1995), *see* Sections 1.223, and 1.294(b) and (c) of the Commission's Rules. It has long been held that "only in the most compelling and unusual circumstances where it is felt that basic fairness to a party requires such action will the . . . filing of pleadings beyond the limits prescribed in the rules [be permitted], either in terms of number or of length." *D. H. Overmyer Communications Co.*, 4 FCC 2d 496, 505 (Rev. Bd. 1966). *See also Filing of Supplemental Pleadings Before the Review Board*, 40 FCC 2d 1026 (Rev. Bd. 1972).¹ Smith has not demonstrated that such unusual or compelling circumstances exist in the instant case. On the contrary, it appears that Smith has done nothing more than attempt, through the vehicle of a Consolidated Reply, to supplement, buttress, and substantially expand the arguments he made in his Petition for Leave to Intervene. *See, e.g.*, Consolidated Reply at ¶¶ 4-11. Consequently, no good cause exists for the acceptance of Smith's unauthorized reply pleading.

4 Moreover, even where the Commission's rules do provide for the filing of a reply pleading, it is well settled that a petitioner will not be permitted to cure a defective or incomplete pleading by filing a reply containing new arguments that could have been included in the original petition. As was stated in *Industrial Business Corp.*, 40 FCC 2d 69, 70 (Rev. Bd. 1973):

To allow the reply to thus serve the purpose of the original petition would be to either (a) effectively render meaningless provisions in the rules for a fair opportunity by another party to respond to allegations or (b) compel the addition of supplementary pleadings not ordinarily contemplated by the rules. . . . Orderliness, expedition and fairness in the adjudicatory process require that reasonable procedural limits be established and maintained; here, those limits have been exceeded.

Petition for Leave to Intervene

5 Smith first seeks intervention in this proceeding as "a party in interest." Petition for Leave to Intervene at ¶ 2. In support, Smith asserts that Zawila holds the construction permit for Station KNGS(FM), Coalinga, California, and that the existence of this permit prevents Smith from seeking to increase the power of Station KMAK(FM), Orange Cove, California, which is licensed to Smith. If, on the other hand, the KNGS permit expired or was cancelled, Smith avers that the "impediment to the possible improvement of [KMAK] could be eliminated." *Id.* Smith next maintains that "he will be able to assist materially in this hearing [because he] undertook his own investigations into the validity of certain of Mr. Zawila's representations, . . . [he] has first hand [*sic*] information and experience with respect to central aspects of the designated issues[,] . . . and he will be able to assist in the development of the factual record based on that information and experience." *Id.* at ¶ 3. The Bureau and Zawila oppose Smith's intervention request.

6. The Petition for Leave to Intervene will be denied. Section 1.223(a) of the Rules, which implements Section 309(e) of the Communications Act of 1934, as amended, states that "any person who qualifies as a party in interest," but who has not been named as a party by the Commission, may acquire the status as a party by filing a petition for intervention "showing the

¹ Although *Overmyer* and *Supplemental Pleadings* were issued by the Review Board, they were cited as precedent by the Commission in *KAYE Broadcasters, Inc.*, 47 FCC 2d 360, 361 n.4 (1974).

basis of its interest." A "party in interest" has been defined as "a person aggrieved or whose interests are adversely affected by grant or denial of the application [under consideration in the proceeding]." *Hertz Broadcasting of Birmingham, Inc*, 46 FCC 2d 350, 352 (Rev. Bd. 1974). In addition, a petitioner seeking intervention must show "a potential direct and substantial injury which could result from the outcome of [the] proceeding," *i.e.*, the grant or denial of the application in question. *Id* Moreover, the burden of making such a showing is on the petitioner, and "specific allegations of fact" must be provided supporting his claims. *Ellis Thompson*, 10 FCC Rcd at 11435.

7. Smith has failed to meet these stringent requirements. He has not, therefore, met his burden of showing that he is a party in interest in this proceeding. Specifically, Smith has completely failed to demonstrate that he would be aggrieved, that his interests would be adversely affected, or that he would suffer a potential direct and substantial injury *as a consequence of the outcome of this proceeding*. Thus, Smith asserts as the *sole* basis for his party in interest argument that the existence of the KNGS permit precludes "the possible improvement" of KMAK.² Petition for Leave to Intervene at ¶ 2. However, the alleged preclusion did not result from and has nothing whatsoever to do with the hearing in this proceeding – the preclusion resulted from the grant of the KNGS construction permit – and an ultimate ruling in this case in favor of Zawila would not aggrieve, adversely affect, or substantially injure Smith. Suffice it to say, in the worst case scenario from Smith's perspective (*i.e.*, a resolution of the KNGS issues in Zawila's favor), Smith would be left in the exact same position he was in before this case was designated for hearing, namely, he would still be precluded from improving his facility due to the KNGS permit. Therefore, the outcome of this proceeding will not adversely impact or injure Smith's interests any more than he has already been "injured." Under these circumstances, intervention under Section 1.223(a) is not warranted.

8. Next, Smith has not demonstrated that discretionary intervention pursuant to Section 1.223(b) of the Rules is merited. This subsection provides, in pertinent part, that a petitioner seeking intervention thereunder must show how his participation "will assist the Commission in the determination of the issues in question." Smith has not met this test. First, the Commission has rejected as a basis for intervention familiarity with the facts of a case. *Kenneth J Crosthwait*, 79 FCC 2d 191, 192-95 (1980). In addition, Smith has failed to show that he alone possesses any factual evidence that would be necessary for the development of a full and complete record, or that the information which he does possess will not be made available for the use of the Enforcement Bureau. In this regard, the appearance of Smith as a fact witness at the hearing does not hinge on his party status; such appearance may, if necessary, be compelled. Further, Smith's Petition for Leave to Intervene virtually ignores the role of the Commission's operating bureaus, which are "entit[ies] expressly devised to take an independent role in Commission proceedings in the public interest,"³ and the intervention petition does not even contend that the Enforcement Bureau is unwilling, unable, or incapable of fulfilling its responsibilities. Finally, it appears that Smith, in seeking intervention, is attempting to advance his own private interests, rather than the public interest. However, intervention will not be permitted for the protection of a petitioner's private interests. *Arizona Mobile Telephone Co.*, 80 FCC 2d 87, 90 (Rev. Bd. 1980), *citing Office of Communication of the United Church of Christ v FCC*, 359 F.2d 994, 1001 (D.C. Cir. 1966).

² In this connection, no technical showing has been submitted by Smith to establish that the improvement of KMAK would, in fact, be possible but for the existence of the construction permit for KNGS. *Cf.* Section 1.223(a) of the Rules (technical showing required where an intervention request is based on a claim of objectionable interference)

³ *Muncie Broadcasting Corp.*, 89 FCC 2d 123, 125 n 1 (Rev. Bd. 1982), *quoting Pressley v FCC*, 437 F.2d 716, 719 (D.C. Cir. 1970). Although the quoted statement referred to the (then) Broadcast Bureau, it is submitted that the Enforcement Bureau performs an identical role in proceedings such as this.

Given all of the above, Smith's participation in this proceeding as a party would be superfluous. *Ellis Thompson*, 10 FCC Rcd at 7326 (¶ 8)

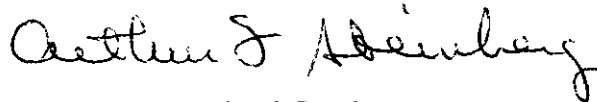
Accordingly, IT IS ORDERED that the Motion for Leave to File Reply, filed by Smith on September 11, 2003, IS DENIED.

IT IS FURTHER ORDERED that the Consolidated Reply to Oppositions to Petition for Leave to Intervene, filed by Smith on September 11, 2003, and the Supplement to Consolidated Reply to Oppositions to Petition for Leave to Intervene, filed by Smith on September 11, 2003, ARE DISMISSED.

IT IS FURTHER ORDERED that the Joint Motion to Strike or, in the Alternative, Response to Consolidated Reply to Oppositions to Petition for Leave to Intervene, filed by Zawila on September 12, 2003, IS GRANTED to the extent indicated above and IS DENIED in all other respects

IT IS FURTHER ORDERED that the Petition for Leave to Intervene, filed by Smith on August 27, 2003, IS DENIED

FEDERAL COMMUNICATIONS COMMISSION

A handwritten signature in cursive script, appearing to read "Arthur I. Steinberg".

Arthur I. Steinberg
Administrative Law Judge